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THE COMMUNITY OF ACQUESTS AND GAINS.

The subject of the matrimonial community of property has become more important with the acquisition of our new possesions. Prior to the late Spanish war, the system prevailed in nearly the same form in Louisiana, Texas, New Mexico, Arizona, California, Nevada, Idaho and Washington. To these jurisdictions we may now add Porto Rico and the Philippines, and Cuba, also, so far as we are interested in the laws of Cuba. It follows that nearly twenty millions of people with whom we are specially concerned are living under this peculiar regime.

Its origin is lost in the mists of antiquity. We are told that in ancient Egypt, there was a kind of matrimonial community of acquisitions and gains. It seems to have existed only as a result of a specific marriage contract for that purpose. Whether the idea may have migrated with ancient commerce to Spain and France might be a subject of curious speculation. The general opinion is that it was a German custom. It was not derived from Roman law; and when it is found in Northern France and in Visigothic Spain by at least the seventh century of our era, the inference as to its Teutonic origin is a strong one.

In the case of Cole's Widow vs. His Executors, 7 Martin, N. S., 41, the Louisiana court said:

"The doctrine of the community of acquests and gains, was unknown to the Roman law; and, although now common, we believe, to the greater number of the European nations, its origin can not be satisfactorily traced. The best opinion appears to be that it took its rise with the Germans, among whom at a very early period of their history, the wife took, by positive law, the one-third of all the gains made during coverture. It is very probable that it was the real, or presumed, care and industry of the wife, which first produced this legislation; and, in an early state of society, the facts most probably fully justified such a rule. But, in this, as in many other instances, legislation survives long after the causes which occasioned it have ceased to exist, and the non-existence of these causes will not authorize courts of justice to refuse giving effect to the law.

There are few, we believe, who think, at the present stage of society, that the wife contributes equally with the husband to the acquisition of property. If such cases exist, they are exceptions to the general rule. And yet, in this state, neither idleness, wasteful habits, nor moral or physical incapacity, would deprive the wife of an equal share in the acquests and gains; for our code declares that every marriage, in Louisiana, superinduces, of right, partnership, or community, in all acquisitions. Such also was the rule in Spain."

In the time of Pothier, the rules as to the community in France were different in the different provinces. There were, then, four leading divisions or classes. In the larger portion of the territory governed by the customary law, and especially where the Custom of Paris and the Custom of Orleans prevailed, the community resulted either from a formal marriage contract establishing it; or from the silence of such a contract; or from a marriage without any contract.

In other provinces, such as those of Brittany and Anjou, the community would result from the silence of the parties on the subject, provided the marriage existed for a year and a day.

A third class was found in the country of the written law,—*droit ecrit,*—where the community, as in Egypt, did not exist unless it had been expressly stipulated in the prenuptial agreement; but such a stipulation might lawfully be made. This fact might indicate the still abiding influence of Roman law in the South of France.

A fourth class was found in Normandy, where the matrimonial community of property was not established by the marriage, nor could it even be created by contract, but was practically prohibited.

The French Civil Code introduced uniform rules throughout France which are based in principle on the Customs of Paris and Orleans. The community may be established either by pre-nuptial contract in legal form, agreeing to a community or recognizing it; or by marriage without such contract, in which case it is presumed. As the French colonies of Canada and Louisiana derived their law from the Custom of Paris, it may be assumed that a similar régime as to the community prevailed in those colonies. In Louisiana, where the Spanish law prevailed during the last generation of colonial existence, the community was governed by the rules derived from Spain.

Saul v. Creditors, 6 Martin, N. S. 569.
Cole's Widow v. Executors, 7 Id. 41.

The leading rules in Louisiana as summarized in her Civil Code of 1870 are as follows:

ART. 2399 (2369). COMMUNITY. Every marriage contracted in this State, superinduces of right partnership or community of acquests or gains, if there be no stipulation to the contrary.

ART. 2400. Id. PROPERTY ACQUIRED BY NON-RESIDENTS. All property acquired in this State by non-resident married persons, whether the title thereto be in the name of either the husband or wife, or in their joint names, shall be subject to the same provisions of law which regulate the community of acquests and gains between citizens of this State.

ART. 2401 (2370). Id. FOREIGN MARRIAGE. A marriage, contracted out of this State, between persons who afterwards come here to live, is also subjected to community of acquests, with respect to such property as is acquired after their arrival.

ART. 2402 (2371). WHAT BELONGS TO THE COMMUNITY. This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of the one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

ART. 2403 (2372). WHAT THE COMMUNITY OWES—INDIVIDUAL INDEBTEDNESS. In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

ART. 2404 (2373). MASTER OF COMMUNITY—HIS RIGHTS—RESTRICTIONS. The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos,* by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

ART. 2405 (2374). DISSOLUTION OF MARRIAGE—PRESUMPTION OF COMMUNITY. At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

ART. 2406 (2375). Id. DIVISION OF COMMUNITY PROPERTY. The effects which compose the partnership or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

ART. 2407 (2376). Id. DIVISION—FRUITS OF SEPARATE PROPERTY. The fruits hanging by the roots on the lands belonging separately to either the husband or the wife, at the time of the dissolution of the marriage, are equally divided between the husband and the wife or their heirs. It is the same with respect to the young of cattle yet in gestation.

The fruits of the paraphernal effects of which the wife reserved to herself the enjoyment, are excepted from the rule contained in this article.

ART. 2408 (2377). Id. DIVISION WHERE SEPARATE PROPERTY IMPROVED AT EXPENSE OF COMMUNITY. When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

ART. 2409 (2378). Id. COMMUNITY OF DEBTS. It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

ART. 2410 (2379). Id. WIFE OR HEIRS MAY AVOID BY RENOUNCING COMMUNITY. Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

ART. 2411 (2380). EFFECT OF RENUNCIATION. The wife, who renounces, loses every sort of right to the effects of the partnership or community of gains.

But she takes back all her effects, whether dotal or extradotal.

ART. 2412 (2381). WHEN WIFE CAN NOT RENOUNCE. The wife who has taken an active concern in the effects of the community, can not renounce the same.

Acts which are simply administrative or conservatory, do not come, in this article, under the denomination of active concern.

ART. 2413 (2382). INVENTORY NECESSARY TO RIGHT OF RENOUNCING. The surviving wife, who wishes to preserve the power of renouncing the community of gains, must make an inventory within the delays and with the formalities prescribed for the beneficiary heir.

A large number of decisions have been rendered by the Supreme Court of Louisiana upon the subject of the matrimonial community, which must be of great value wherever the institution prevails. And, dealing, as these adjudications do, with intricate questions

of status, domicile, and real and personal statutes, they have contributed not a little to the science of private international law.

Some reference has already been made to the law of Spain in this matter, which has been to some extent expounded in the Louisiana cases. This law, as it is assumed to prevail in our new possessions, is found in the Spanish Civil Code of 1889, from which some leading articles may be translated as follows:

52. Matrimony is dissolved by the death of one of the consorts.

59. The husband is the administrator of the property of the conjugal society, except when stipulated to the contrary, and that provided in Art 1384 [concerning separate property].

When he is under eighteen years of age, he can not administer without consent of his father and, in his default, without that of the mother, and, in default of both, without that of his guardian.

Neither can he appear in a suit in court without the assistance of said persons.

In no case, until he has attained majority, can the husband, without the consent of the persons, mentioned in the preceding paragraph, borrow money, burden nor alienate the real property.

1315. Persons who are to be united in marriage may, before entering into it, execute contracts, stipulating the conditions for the conjugal society in reference to present and future property without any other limitations than those stated in this Code.

In default of contracts about property, it shall be understood that the marriage has been contracted under the system of legal conjugal community.

1316. In the contracts, to which the preceding article refers [i. e., marriage contracts,] the contracting parties shall not stipulate anything contrary to law or to good morals, nor humiliating to the authority belonging respectively to the future consorts within the family.

All stipulations not conformable to the provisions of this article shall be considered null and void.

1392. By virtue of the conjugal community, the earnings or profits indiscriminately obtained by either of the consorts, during the marriage, shall belong to the husband and the wife, share and share alike, when the marriage is dissolved.

1393. The conjugal community shall always begin on the same day that the marriage is celebrated.

Any stipulation to the contrary shall be void.

1394. This community can not be renounced during the marriage, except in case of judicial separation.

When the renunciation takes place on account of a separation, or after the marriage has been dissolved or declared null, said renunciation shall be set forth in a public instrument, and the creditors shall have the right granted them in Art. 1001 [to oppose a fraudulent renunciation].

1395. The conjugal community shall be governed by the rules of the contract of partnership in all that does not conflict with the express provisions of this chapter.

1396. The following is the separate property of each of the consorts:

1. That brought to the marriage as his or her own.

2. That acquired under a lucrative title by either of them, during the marriage.

3. That acquired by right of redemption or by exchange for other property belonging to only one of the consorts.

4. That bought with money belonging exclusively to the wife or to the husband.

1401. To the conjugal community belong:

1. Property acquired by onerous title, during the marriage, at the expense of the community property, whether the acquisition is made for the community or for only one of the consorts.

2. That obtained by the industry, salaries or work of the consorts or of either of them.

3. The fruits, rents, or interests collected or accrued during the marriage, and which come from the community property, or from that which belongs to either one of the consorts.

1412. The husband is the administrator of the conjugal community, with the exception of what is prescribed in Art. 59.

1413. Besides the power which the husband has as administrator, he may alienate and burden by onerous title the property of the conjugal community without the consent of the wife.

Notwithstanding, every alienation or agreement which the hus-

band may make, respecting said property in opposition to this Code or in fraud of the wife, shall not cause injury to her or to her heirs.

1414. The husband can dispose of his half of the property of the conjugal community, only, by testament.

1415. The husband may dispose of the property of the conjugal community for the purposes stated in Art. 1409 [education and establishment of the children of the marriage, etc.].

He may also make moderate donations for objects of piety or beneficence, but without reserving to himself the usufruct.

1416. The wife can not bind the property of the conjugal community without the consent of the husband.

The cases provided in Arts. 1362, 1441, and 1442 are excepted from this rule [certain necessary family expenses, and absence and interdiction of husband].

1417. The conjugal community expires on the dissolution of the marriage, or when it is declared null.

The consort who, on account of his or her bad faith, caused the nullity, shall not share any part of the property of the community.

The conjugal society shall also terminate in the cases specified in Art. 1433 [concerning judicial decrees of separation of property].

1408. The conjugal community shall be responsible for:

1. All the debts and obligations contracted during the marriage by the husband, and also those contracted by the wife in the cases in which she can legally bind the community.

2. The arrears of interests, matured during the marriage, of obligations which affect the private property of the consorts as well as the community property.

3. The minor repairs or those of mere preservation, made during the marriage, on the private property of the husband or the wife. Extensive repairs shall not be chargeable to the community.

4. Extensive or minor repairs of the property of the community.

5. The maintenance of the family and the education of the children in common, and of the legitimate children of only one of the consorts.

1409. The conjugal community shall also bear the amount of what has been donated or promised to the children in common by the husband, only for their establishment or for a professional career, or by both consorts by a common consent, when it may not

have been stipulated that it should be paid in whole or in part out of the private property of one of them.

1410. The payment of debts contracted by the husband or by the wife, before the marriage, shall not be borne by the community. Neither shall it bear the payment of fines or pecuniary condemnations imposed on either of them.

However, the payment of debts contracted by the husband or the wife, prior to the marriage, and that of fines and condemnations imposed on either of them may be claimed against the community property, after covering the claims emunerated in Article 1408, [sundry prior claims] when the debtor consort has no private capital, or it be insufficient; but at the time of the liquidation of the community, the payments, made for the specified causes, shall be charged to said consort.

1430. Support shall be given out of the property belonging to the community to the surviving consort and his or her children, pending the liquidation of the inventoried estate and until they have received their share; but it shall be deducted from their portion in so far as it exceeds what should have belonged to them as fruits or rents.

1431. Whenever the liquidation of the community properties of two or more marriages, contracted by the same person, has to be simultaneously effected in order to determine the estate of each community, every kind of evidence shall be admitted, in default of inventories; and, in case of doubt, the community property shall be distributed between the different communities in proportion to the time of the duration of the same and to the property belonging to the respective consorts.

As intimated above, many questions of private international law may arise with respect to the matrimonial community, especially in a nation like our own, composed of so many States having, at least, a limited sovereignty in local matters. The rule that movables follow the person of the owner, on the one hand, and that the title and devolution of real estate are controlled by the law of the situs, on the other, would naturally play a large part in a country where residence and domicile may be in one jurisdiction, and property easily acquired in another. In Louisiana, for many years, the subject has been controlled by the Statute of 1852, now carried into Article 2400 of the Revised Civil Code.

The matrimonial community is sometimes referred to as a kind of juridical being, but it would hardly be safe to look upon it as having the personality of a corporation. The most that can be logically said, in this respect, is that some of the rules in regard to juridical persons, or legal entities, might be usefully applied in matters of acquisition, alienation, and liquidation. So, also, the community is sometimes called a partnership between the spouses; but we ought not to go too far in this direction. It resembles a partnership in some respects, and that word is sometimes used in regard to it; but in other respects it is very different from a partnership. It is a community of gains resulting from marriage, and governed by special rules. It is presumed to have resulted from a status, even in the absence of any agreement respecting it. The share of those interested is not determind by the amount contributed. The husband, during its continuance, properly speaking, has the sole power of management, administration, and alienation. It cannot be dissolved by mere consent, and after its dissolution by death the surviving wife may renounce it and escape its liabilities.

The system of matrimonial community has its merits and advantages. But, as was pointed out by Professor Pomeroy, after he took up his residence in California, it has some disadvantages, at least, in the matter of titles to real estate. Our people move back and forth from one State to another and are notoriously careless in regard to family records. And the laws of many of our States are very imperfect in regard to the preservation of any public history of personal status. It is, therefore, very difficult to make such status a matter of definitive registry, and thus make a title certain. There have been many cases where a widower residing in a common law State has sold land situated in another State where the community laws prevail, in perfect good faith, without remembering that it was acquired during his marriage, and that the sale, in order to be perfect, would require the consent of the heirs of the pre-deceased wife. Other examples have been found where the fact of marriage was unknown to the purchasers, and after the conveyance and payment of the price, the wife or her heirs have appeared. Conveyancers will try to avoid trouble by procuring such evidence as they can of status; but it is difficult to make things certain, and it may well be that some legislation on the subject is desirable.

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